

08-0714
INCOME
TAX YEAR: 2004
SIGNED: 11-13-2008
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON
EXCUSED: D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	ORDER GRANTING MOTION TO DISMISS Appeal No. 08-0714 Account No. ##### Tax Type: Income Tax Tax Year: 2004 Judge: Phan
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Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP., CPA
For Respondent: RESPONDENT REP. 1, Manager, Income Tax Auditing
RESPONDENT REP. 2, Senior Auditor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Hearing on Motion to Dismiss on August 27, 2008. Respondent's (the "Division's") Motion to Dismiss, dated July 29, 2008, ("Motion") was based on the contention that Petitioner (the "Taxpayer") had failed to timely file an appeal of the audit deficiency for the tax year 2004.

APPLICABLE LAW

State taxable income is defined as federal taxable income with some modifications, subtractions and adjustments. (Utah Code Sec. 59-10-112 (2004).)¹

¹ The Individual Income Tax Act was recently revised and sections renumbered. The Commission applies the substantive law that was in effect during the tax years at issue regarding the amount of the tax calculation, and cites

For the purposes of determining state taxable income, federal taxable income means taxable income as defined in Section 63, of the Internal Revenue Code. (Utah Code Sec. 59-10-111(2004).)

If a change is made in a taxpayer's net income on his or her federal income tax return, either because the taxpayer has filed an amended return or because of an action by the federal government, the taxpayer must notify the Utah Tax Commission within 90 days after the final determination of such change. The taxpayer shall file a copy of the amended federal return and an amended state return that conforms to the changes on the federal return. (Utah Code Sec. 59-10-536 (5)(a).)

Except in any case where the taxpayer has earlier filed with the commission a Petition for Redetermination of the deficiency as provided in Title 59, Chapter 1 Part 5, the notice of deficiency shall constitute a final assessment of the deficiency in tax, including interest thereon and any penalties or other additions to tax: (a) upon the expiration of 30 days, or 90 days if the notice is addressed to a person outside of the states of the union and the District of Colombia, after the date of mailing of the notice of deficiency to the taxpayer. . . (Utah Code Sec. 59-10-525.(1).)

A taxpayer may file a request for agency action, petitioning the commission for redetermination of a deficiency. (Utah Code Sec. 59-1-501.)

A petition for redetermination is deemed to be timely if: 1) the petition is received in the Tax commission offices on or before the close of business of the last day of the time frame provided by statute; or 2) the date of the postmark on the envelope or cover indicates that the request was mailed on or before the last day of the time frame provided by statute. (Utah Admin. Rule R861-1A-20(2).)

DISCUSSION

The representative for the Division points out that the Statutory Notice of Audit Change was issued on February 12, 2008. The Taxpayer's appeal was not submitted in this matter until April 11, 2008.

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The Division's representative pointed out that, pursuant to Utah Code Sec. 59-10-525, an audit deficiency becomes the final assessment unless an appeal is filed within thirty-days from the date of the Notice of Deficiency. He also points to Utah Code Sec. 59-1-501 and Utah Admin. Rule R861-1A-20 in support of the Division's position. In addition, the thirty-day deadline and instructions on how to file an appeal and form for filing the appeal were included with the Statutory Notice.

The Taxpayer's representative stated that there were two factors in this matter that support allowing the appeal to remain open. First of all he argued that the matter was really a refund request and as such it was timely. The Taxpayer had filed amended state and federal returns claiming refunds for both the 2003 and 2004 tax years. The Division had paid a refund to Petitioner based on the amended Utah return. However, on January 19, 2007, the IRS had issued a denial of the federal refund claim. Petitioner had formally appealed that denial and the IRS appeal is still pending. However, the Utah audit appears to be based on the IRS denial, as if it was final. The IRS informed Petitioner in June 2008 that it would be issuing the decision within 90 days. Petitioner argues it would make sense to allow this state tax appeal to remain open until the IRS finalized the federal tax appeal. Additionally he argues that the Taxpayer had 90 days to file a Utah amended return pursuant to Utah Code Sec. 59-10-536(5) from when the IRS made a final determination that affected her federal taxable income. In this case the IRS denied her amended return on January 19, 2007 and the Taxpayer's appeal filing was within ninety days from that date.

Further, a second reason offered and explanation for the late filing of the appeal, the Taxpayer's representative indicated that the Taxpayer had filed late because she had begun the fourth round of chemotherapy, from February 2008 through May 2008, which left her ill and bedridden during this period.

Upon review of the parties' legal arguments and the factual information provided in this matter, the Commission notes first that the audit assessment was based on a final determination made by the

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IRS regarding Petitioner's federal taxable income. Petitioner is in the process of appealing the IRS's determination regarding her federal taxable income. If Petitioner is successful she could file amended returns or contact the Auditing Division at that time about readjusting the audit based on the revised federal taxable income. That this originally began as a refund claim and is still pending in the appeal process with the IRS is not basis to allow a late filed appeal.

The second point raised by Petitioner's representative was Petitioner's illness. Her medical condition at the time the audit notice was issued and during the thirty-day appeal period was significant and reasonably may have impeded her ability to file the appeal timely. However, the Tax Commission does not have statutory authority² to accept a late filed appeal for "good cause." The filing deadline is jurisdictional and there is no basis to allow this late filed appeal.

ORDER

The thirty-day requirement for filing an appeal is jurisdictional and is strictly construed. The Tax Commission has not been granted statutory authority to allow late filed appeals based on good cause and there is no basis for the Commission to accept this late filed appeal. Respondent's Motion to Dismiss is granted. It is so ordered.

DATED this _____ day of _____, 2008.

Jane Phan
Administrative Law Judge

BY ORDER OF THE COMMISSION.

² Appellate Courts have been given express authority to accept an appeal filed after the deadline if the party shows "good cause" or "excusable neglect." See Utah Rules of Appellate Procedure 4(e). Further some Administrative Agencies have been delegated authority to adopt a "good cause" standard. For instances the Utah Court of Appeals noted in *Armstrong v. Department of Employment Security*, 834 P.2d 562 (1992), that the Industrial Commission based on authority delegated in Utah Code Sec. 35-4-6(b) had adopted Administrative Rule 475-6c-8, which provides "A late appeal may be considered on its merits if it is determined that the appeal was delayed for good cause."

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The undersigned have reviewed this motion and concur in this decision.

DATED this _____ day of _____, 2008.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Notice and Appeal Rights: Failure to pay the balance due as a result of this order within thirty days may result in an additional late payment penalty. You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Commission pursuant to Utah Code Sec. 63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Sec. 59-1-601 et seq. and 63-46b-13 et seq.

JKP/08-0714.dis